Supreme Court, U.S.
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No. 97-1394

In The

Supreme Court of the United States

October Term, 1997

SOUTHEASTERN MARITIME COMPANY AND
GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

v.

ALONZO BROWN and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether annual adjustments under § 10(f) of the Longshore and Harbor Worker's Compensation Act accrue from the date of injury, and not from the date the claimant is found to be permanently, totally disabled.

Whether this Court's decision can be applied retroactively to affect this case.

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties to the proceeding.

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CITATIONS TO OPINIONS AND ORDERS BELOW

Respondent has no additions to this section.

STATEMENT OF BASIS FOR JURISDICTION

Respondent has no additions to this section.

STATUTES INVOLVED IN THE CASE

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under § 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum. 33 U.S.C. § 910(f).

STATEMENT OF FACTS

1. Respondent was injured on August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye; experienced pain in his neck

and lower back; and subsequently experienced residual psychological problems.

2. He has never been able to return to work since his injury.

3. He has been awarded compensation benefits for total disability from the date of injury to present.

4. On or about January 19, 1994, the Honorable Aaron Silverman issued a Decision and Order wherein he found Respondent to be entitled to permanent total disability from January 29, 1987 and continuing.

5. On or about February 14, 1994, Petitioner timely filed a Motion for Reconsideration asserting that the Decision should be clarified to provide that annual adjustments under § 10(f) accrue from the date the Respondent is found to be permanently, totally disabled, and not from the date of the injury.

6. On or about August 17, 1994, the Honorable G. Marvin Bober issued a Decision and Order on Motion for Reconsideration in which he acknowledged that *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981) is still binding precedent in the Eleventh Circuit.

7. On or about September 13, 1994, Petitioner appealed the decision of Administrative Law Judge Bober to the Benefits Review Board.

8. On or about September 12, 1996, the Benefits Review Board affirmed the decision of Administrative Law Judge Bober.

9. On or about October 28, 1996, Employer timely filed a Petition with the Eleventh Circuit for Review of the order of the Benefits Review Board.

10. On or about September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer's Petition.

11. On or about November 26, 1997, Employer timely filed a Suggestion for Rehearing *En Banc*.

12. On or about November 26, 1997, the Court of Appeals denied Employer's Suggestion for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

I. The issue in this case is whether § 10(f) of the Longshore and Harbor Worker's Compensation Act entitles a permanently totally disabled Claimant to receive annual compensation adjustments accruing each October 1st beginning from the date of injury.

The Petitioner has sought review by this Court to determine the accrual date for cost of living increases (hereinafter COLA) for longshoremen who have become permanently totally disabled due to a job-related injury. Certiorari should not be granted to the Petitioner on the question presented. This case involves a very narrow issue, affecting only a handful of individuals nationwide. Moreover, the Eleventh Circuit's opinion retains the best, most common sense application of the COLA for individuals who have suffered permanent total disability. The Eleventh Circuit continues to follow the rule of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), because

it fairly and uniformly applies the COLA to longshoremen based on the ultimate status of their injury, not the mere fortuity of their adjudication date. *Hamilton v. Crowder Construction Co.*, 22 B.R.B.S. 121, (1989), *aff'd*, 890 F.2d 1143 (11th Cir. 1989). The language of the statute is *not* offended by this interpretation. On the contrary, the spirit and intent of Congress in providing those claimants who are permanently totally disabled with a meaningful and uniformly applied COLA is maintained.

II. The position urged by the Petitioner would create arbitrary and inconsistent results.

As urged by the Petitioner, § 10(f) of the Longshore Act would apply as follows:

1. Two Claimants have the same date of injury.

2. Neither Claimant has ever been released to return to work by his doctor.

3. Both men have the same compensation rate based on identical earnings.

4. Both men have been determined by their doctors to be permanently totally disabled.

5. Claimant A, however, was adjudicated permanently totally disabled three years from his date of injury. Claimant B was not adjudicated permanently totally disabled until six years from his date of injury.

6. Even though both Claimants were identically situated from the first day of their injuries; even though both men now have the same disability status; Claimant A will receive a substantially higher benefit than Claimant B.

There is no rational basis upon which to treat the two individuals differently. The date of their injury was the date when their compensation rates were frozen. Both individuals have achieved the requisite status entitling them to the increase. Common sense suggests that they should be treated consistently. *The position urged by Petitioners would encourage frivolous delays in the adjudication process in order to defer the COLA.*

Contrary to Petitioner's argument, Congress did not expressly prohibit the COLA from being calculated beginning October 1st following the date of injury. If anything, § 10(f) is silent with respect to the year in which the benefit begins to accrue. It simply states that there shall be a cost of living adjustment calculated October 1st of "each year". The statute then states that the adjustment shall be added to benefits being paid for permanent total disability. If Congress had intended this benefit to operate as Petitioner urges, the language could have been made express. As shown above, Petitioner's argument created arbitrary and inconsistent results. Under *Holliday* and *Hamilton*, the results are consistent and predictable. A COLA provision that does not adjust benefits uniformly so that similarly situated claimants are treated consistently would not fulfill the intent of Congress. Petitioner's interpretation does not promote uniformity or fairness, which Congress must be deemed to have intended. The Eleventh Circuit's position is therefore entirely plausible and consistent with the statute.

III. *Holliday* and *Hamilton* represent a common sense application of § 10(f).

Section 10(f) of the Longshore and Harbor Workers' Compensation Act provides:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under § 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,
>
> (2) 5 per centum 33 U.S.C. § 910(f).

In *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), prior to the split between the Fifth Circuit and the Eleventh Circuit, the Fifth Circuit held that claimant's permanent total disability adjustment rate would include all intervening § 10(f) adjustments occurring during the period of his temporary total disability.

After the split between the Fifth and Eleventh Circuits, a three judge panel of the Eleventh Circuit refused to overrule *Holliday. Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Hamilton*, 890 F.2d 1143 (1989). En Banc review was rejected by the Eleventh Circuit on March 15, 1990. The order signed by Chief Justice Tjoflat stated "The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested

that the Court be polled on rehearing En Banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED." See Appendix A.

The Respondent is certainly aware of contrary decisions in other jurisdictions. Nevertheless, Respondent contends that the Eleventh Circuit has correctly continued to follow the statute and Congressional intent with respect to the less-than-artful language set forth in § 10(f).

Prior to 1972, there was no provision in the LHWCA providing for annual adjustments. When Congress added § 10(f) in 1972, the clear intent was to provide Claimants suffering from a permanent total disability with a genuine cost of living increase. The House and Senate Reports succinctly state that § 10(f) is intended to "provi[de] for upgrading benefits in future years for cases of permanent total disability or death benefits". H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972); S.Rep. No. 92-1125, 92d Cong., 2d Sess. 6 (1972), reprinted in 1972 (emphasis added).

In this case, Respondent suffered a period of "temporary" total disability which eventually became "permanent". Following his injury, he was never able to return to work. Respondent has been totally disabled from all work from the date of his injury to present. Statutory construction compels us to lend a common sense interpretation to what would otherwise be an artificial distinction between Respondent's total disability and a formal adjudication of this fact.

Judge Tang addressed this artificial distinction in his special concurrence in *Bowen v. Director, OWCP, et al.*, 912

F.2d 348 (9th Cir. 1990). In *Bowen*, Judge Tang writes as follows:

> This result defies common sense. Indeed, the D.C. Circuit noted that a more "sensible" reading of the Act would permit inclusion of periods of "temporary" disability preceding classification as "permanent" in cost-of-living increase computations. *Brandt v. Stidham Tire Co.*, 251 U.S. App. D.C. 331, 785 F.2d 329, 332 n. 4 (D.C. Cir. 1986). In the D.C. Circuit's case, a worker was classified as "temporary" disabled for eight years while "it was unclear whether his total disability would endure" before, upon adjudication and classification as "permanently" disabled, he became eligible for cost-of-living increases. *Id.* at 331. Of course, the worker was as "permanently" disabled at the beginning of his "temporary" eight years' disability as he was at the end of it. *Common sense and fairness would dictate treating both periods alike. Their disparate treatment not only offends common sense and fairness, but also may discourage workers from attempting to return to work because any postponement of "permanent" disability will, as in Bowen's case, disqualify the interim period from computation in cost-of-living increases. Id.*, at 352. (Emphasis added).

These points are directly in keeping with Respondent's circumstances in this action. He has never been able to return to work, he has been totally disabled from all work from the date of his injury to present.

Finally, Judge Tang adds, " . . . a line drawn at the adjudication of a 'permanent' disability which excludes a

period immediately preceding it of 'temporary' total disability *makes no practical sense and fails to serve the beneficent purposes of the Act." Id.*, at 352. (Emphasis added).

IV. Certiorari should not be granted, because this Court's decision would not apply retroactively.

In *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 B.R.B.S. 36 (CRT) (5th Cir. 1990), the Court addressed this issue as follows:

> The well-known test that must be met before a new decision can be applied non-retroactively is set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971): First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. . . . Finally, we have weighed the inequity imposed by retroactive application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Id.*, at 1036.

In this case, Respondent meets the test for non-retroactive application. If *Holliday* is reversed, the Court will

be announcing a new rule in the Eleventh Circuit. Secondly, the Longshore Act has always received liberal construction. The interpretation proposed is consistent with the beneficent purposes of the Act. Here, retroactive application may result in a disgorgement of past benefits that would work undue hardship in this instance. Contrary to *Phillips*, neither the Director, nor the Employee/Insurer, have promised *not* to seek disgorgement of past benefits. Even were such promise made, Respondent submits that he would be subjected to "substantial inequity" contrary to the intent of the Act.

CONCLUSION

The Petitioner has asked this Court to overrule binding precedent in the Eleventh Circuit. Respondent is opposed. In this instance, the lower court has had the opportunity to address this issue twice, once in *Hamilton* and again with this case. Their ruling remains sound and should not be disturbed.

Once again, this issue involves a very narrow question affecting only a handful of individuals nationwide. The Eleventh Circuit's opinion retains the best, most common sense application of the COLA for individuals who have suffered permanent total disability.

Based on the foregoing, Respondent requests that the Petition for Certiorari be denied.

This 25th day of March, 1998.

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8391

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

ROBERT L. HAMILTON, CROWDER CONSTRUCTION and AETNA CASUALTY AND SURETY COMPANY,

Respondent.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion December 18, 1989, 11 Cir., 198___, ___F.2d___).

(Filed Mar. 15, 1990)

Before TJOFLAT, Chief Judge, and KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edward Tjoflat
United States Circuit Judge